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No. 04-1061

Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID PHILLIPS and STEPHAN PHILLIPS,

Petitioners,

v.

RICHARD BOWLES, MICHAEL VERNA, ROBERT WESTERFIELD, KEVIN REAGER and BOWLES & VERNA LLP,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONSE TO QUESTIONS PRESENTED

As will be set forth in detail in the body of this brief, each of the questions presented in the petition contains egregious misstatements of the record below, including the holdings of the various courts who have reviewed this case. None of the six questions presented represents a properly preserved issue of federal law.

LISTING OF PARTIES TO THE PROCEEDING

The petition correctly states the names of all parties to this case.

RULE 29.6 STATEMENT

This brief is not filed on behalf of any corporation.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Richard Bowles, Michael Verna, Robert Westerfield, Kevin Reager and Bowles & Verna LLP ("B&V") respectfully oppose the petition for writ of certiorari and request that the petition be denied.

JURISDICTION

The unpublished opinion of the California Court of Appeal was filed July 9, 2004. Petitioners' petition for rehearing was denied August 5, 2004. Petitioners' petition for review to the California Supreme Court was denied on October 13, 2004. Since the petition presents no issue of Federal law which was properly preserved by petitioners below, the Court lacks jurisdiction pursuant to 28 U.S.C. § 1257.

INTRODUCTION

Petitioners David, Stephan and Carolyn Phillips (collectively, the "Phillips") seek review on six different issues. The Phillips' petition is frivolous and should be denied.

In their first three issues, the Phillips claim that their constitutional rights were violated when the California courts incorrectly resolved certain state law issues. However, the Court has stated repeatedly that the mere allegation that a state court interpreted or applied state law incorrectly does not automatically raise a Federal due process claim. Since no properly preserved issue of Federal

law is stated with respect to these three issues, review should be denied. With respect to their fourth, fifth and sixth issues, the Phillips make no attempt at all to demonstrate an issue of Federal law, so review should be denied with respect to those questions as well.

Besides, all six issues of California state law raised by the Phillips were properly decided, based upon substantial evidence in the record and settled principles of state law.

First, the Phillips claim that the Court of Appeal required them to arbitrate matters they had not agreed to arbitrate. The Court of Appeal said nothing of the kind. The Court correctly held that the dispute between the parties was over what the Phillips' former lawyers, B&V, were owed, and that that dispute was of a kind the Phillips *had* agreed to arbitrate.

Second, the Phillips complain they were held to have ratified the May 1998 fee agreement when they explicitly refused to ratify it. Not so. In a routine and proper application of the doctrine of election of remedies, the trial court held that the Phillips could not use the May 1998 Agreement to block arbitration while simultaneously arguing that the May 1998 Agreement was void and unenforceable, and the Court of Appeal correctly affirmed.

Third, the Phillips argue that their scurrilous statements about B&V and attorney Richard Bowles were subject to California's litigation privilege, and that they were wrongly barred from proving the truth of those statements. False accusations of crime made in the context of a civil attorneys fees dispute are not privileged. The Phillips were given an opportunity to prove the truth of their allegations, and they failed.

Fourth, the Phillips argue that an "extorted" fee agreement cannot be the basis of a judgment for false promise. The Phillips' claim that the May 1998 Agreement was "extorted" is contrary to overwhelming evidence in the record.

Fifth, the Phillips claim that B&V withdrew from the case against Farmer's so any recovery by B&V must be limited to *quantum meruit*. Again, not so. David Phillips repudiated the fee agreements between the parties, so any further performance by B&V was excused, and B&V had the right to sue for total breach and seek contract damages. Besides, even if the Phillips were correct, which they are not, they have waived this argument through the doctrine of invited error.

Finally, the Phillips argue that their bogus malpractice claim should not have been dismissed, because they had the right to recover not merely attorneys fees and statutory costs in the underlying insurance bad faith case, but *all* expenses they incurred. But as the Court of Appeal observed, there is no authority supporting the Phillips' argument.

The petition should be denied.

STATEMENT OF THE CASE

Because the brief factual summary contained in the petition is riddled with misstatements of the facts relevant to the questions supposedly presented, we begin with a summary of the relevant facts.

I. FACTUAL BACKGROUND

David Phillips is an attorney who holds a Ph.D. from Stanford University. (RT 541-43.)[1] He and his brother Stephan own a partnership called Phillips Properties. (RT 541-42, 545, 712.) Their mother Carolyn is also an attorney, and has represented Phillips Properties since its creation. (RT 542, 555, 566, 714, 756, 1766-67.)

In the summer of 1994, the Phillips suffered two separate fires and two vandalism incidents at their eleven thousand square foot house in Martinez, California. (RT 553-54, 557-58, 559-60, 1407-08.) When their insurer, Farmers, made it clear that it believed the Phillips had set the fires, the Phillips began consulting attorneys. (RT 559, 561.) In January 1996, Carolyn contacted Richard Bowles at B&V.

A. The January 1996 Agreement

Mr. Bowles forwarded Carolyn the firm's standard hourly fee retainer agreement. (Exhs. 4, 5.) David signed the agreement, which was returned with a retainer check. (RT* 25-26; RT 582.) No member of the Phillips family expressed disagreement with any provision of the January 1996 Agreement. (RT* 25.)

The parties met and agreed that B&V would try to settle the Phillips' claims against Farmers, but if that effort was unsuccessful, B&V would sue Farmers on the

[1] The Phillips cite to the record from at least two of their many appeals. Throughout this brief, "RT" and "CT" refer to the Reporters' and Clerk's Transcripts, respectively, from appeal no. A099483. "RT" and "CT*" refer to the Reporters' and Clerk's Transcripts from appeal no. A096593.

Phillips' behalf. (RT* 37-38.) After negotiations with Farmers failed, Carolyn and David both agreed to go forward with litigation pursuant to the January 1996 Agreement. (RT* 27-28.) Mr. Bowles told them he would prepare a written memorialization of the parties' decision to continue to operate under the January 1996 Agreement, but Carolyn told him that such a writing was unnecessary. (RT* 27.)

As a result of Farmers' intensive litigation tactics (RT 1350-52), the Phillips' unpaid fees balance mounted rapidly. Mr. Bowles first spoke with the Phillips about the issue, and then began writing them letters, urging them to bring their account current. (RT* 64-65, 67-68; RT 626-33.) By letter dated January 24, 1997, Mr. Bowles warned David that future legal fees would reach or exceed $250,000. He confirmed that David had offered to provide B&V with a promissory note and second deed of trust on a Los Angeles house David and Stephan owned in order to secure that payment. (RT* 72, 101; Exh. 21.)

Mr. Bowles wrote David and Carolyn again on the issue of unpaid fees in late June, 1997. (RT* 69-70; Exh. 27.) In another letter written a few days later regarding the unpaid fees, Mr. Bowles pointed out that B&V had never agreed to finance expensive litigation, and raised the possibility that B&V might have to withdraw. (RT* 72.)

B. The August 1997 Agreement

Mr. Bowles wrote David again on July 18, 1997 about the unpaid fees issue. He reminded David that the firm had an inherent conflict of interest in talking about fees, and that the Phillips had the right to seek independent counsel and/or to refuse to modify the January 1996 Agreement. (RT* 76-77; Defs. Exh. H, p. 3.) The parties

began negotiating modifications to the January 1996 Agreement. After extensive negotiations in which the Phillips actively participated, suggesting various alternative arrangements, the August 1997 Agreement was signed. (RT* 80-82.)

Despite the modification to the January 1996 Agreement, the Phillips still failed to meet their obligations to pay fees as they were incurred. Mr. Bowles wrote David again about the matter on August 28, 1997, and pointed out that the litigation was being handicapped by the Phillips' failure to live up to their obligations to pay expert witnesses. (RT* 96-97; Defs. Exh. L, p. 1.)

With the unpaid fee balance continuing to mount, Mr. Bowles wrote David again on December 23, 1997. (RT* 110-11; Defs. Exh. R.) By the time of this letter, David had for the first time taken the position that the Phillips had no obligation to pay B&V's invoices on a monthly basis. (RT* 111.) Not so, Mr. Bowles said, "and we have told you that on several occasions." (RT* 111; Defs. Exh. R, p. 1.) Mr. Bowles then reviewed the history of the Phillips' delinquency. (Defs. Exh. R, p. 1-2.)

Mr. Westerfield wrote David on March 14, 1998, attaching copies of unpaid invoices. Westerfield noted that a variety of vendors – whom the Phillips had agreed to pay directly – had unpaid balances more than seven months old, and that B&V's professional relationships with the vendors were being damaged by the Phillips' delinquency. (Defs. Exh. U, pp. 1-2.) Incredibly, David responded by asking Westerfield why he should pay the court reporters, since he already had what he needed from them. (RT 1526.)

C. The Parties Negotiate and Sign the May 1998 Agreement

Shortly thereafter, with the Phillips' unpaid fees balance having reached approximately $480,000, (RT* 120), Mr. Bowles and Mr. Westerfield wrote the Phillips again. They detailed the Phillips' failure to live up to their obligations under the retainer agreement and its various modifications. (Defs. Exh. W, p. 2.) "We simply want to be paid for our time as you agreed to do in the original retainer agreement," the attorneys wrote. (Defs. Exh. W, pp. 2-3.) The attorneys also discussed the damage the firm was incurring from the Phillips' refusal to abide by their obligation to pay court reporters and other vendors. (Defs. Exh. W, pp. 3-4.)

The parties met on April 8, 1998. The meeting lasted several hours and consisted of give and take about the unpaid fees issues. (RT* 123.) David stated that he wanted to draft any new fee agreement; he forwarded a draft modification agreement on April 22, 1998, along with a cover letter stating that "I am absolutely certain that I will be able to perform under the terms of the agreement as they are now drafted." (Defs. Exh. Z, p. 1; RT* 123.)

David wrote to Mr. Bowles again on May 8, 1998, enclosing three new drafts of an agreement. "David was continuing to negotiate," Bowles testified. "Even though we'd spent a substantial period of time and thought we were close to a finalization of it he's come back with three different versions and is continuing to negotiate." (RT* 127.) "I believe that the August [1997] Agreement is valid and in full effect," David wrote. (Defs. Exh. AA, p. 4.) By negotiating yet another modification, he did not "in any

way agree to rescind or nullify the August Agreement." (Defs. Exh. AA, p. 5.)

The parties met again on May 11, 1998 (RT* 129-30), but David terminated those discussions when the B&V attorneys asked that the new agreement – just like the earlier agreements – provide for a lien on any eventual judgment the Phillips recovered from Farmers in order to ensure that the Phillips would actually pay B&V what was owed. (RT* 132; Defs. Exh. AA.)

Negotiations continued, and David finally agreed to give B&V a lien on one-half of any judgment. "Thank you for your cooperation in finally completing this Agreement," David wrote. (Defs. Exh. DD, p. 2; RT* 137-38.) The agreement was executed in late May 1998. The Phillips acknowledged that as of April 1, 1998, they owed a balance of $470,887.54 in unpaid fees. (Exh. 66.)

D. B&V Wins a Multi-Million Dollar Verdict for the Phillips, and the Phillips Respond By Repudiating All Fee Agreements With B&V

Finally, the Phillips' case against Farmers went to trial. In January 1999, after a five-and-a-half month trial, the jury returned verdicts for the Phillips of seven and one-half million dollars, including both compensatory and punitive damages. (Exh. 87.) A few days later, David repudiated all fee agreements with B&V, telling the attorneys that the Phillips had no obligation to pay the firm and that in David's view, none of the agreements he and Stephan had entered into with the firm were valid. (RT 1290-91, 1597, 1621, 1691, 1910.) At that time, the Phillips owed B&V approximately $1.5 million in hourly fees and costs plus in excess of $1 million in bonuses.

(Exhs. 449, 570.) Overall, B&V had expended over 9,000 hours in attorney and paralegal time representing the Phillips, and the Phillips had paid B&V approximately $60,000. (RT* 150; RT 1307, 1913-14, 1939-41.)

For a few months after David and Stephan repudiated the agreements, B&V continued to try to negotiate a resolution to the dispute, while handling post-trial motions on the Phillips' behalf. (RT 844, 1560, 1691, 1913-15.) Finally, in early May, with David still recalcitrant, B&V executed a substitution of attorneys, and Carolyn began representing her sons. (RT 703, 1141, 1915.)

II. THIS LITIGATION

A. David and Stephan Sue Bowles & Verna Over the Fee Dispute

Rather than paying B&V what they owed, David and Stephan sued the firm, Mr. Bowles, Mr. Verna, Mr. Westerfield and associate Kevin Reager. The Phillips purported to state no less than ten different causes of action against their former attorneys, including *inter alia*, legal malpractice, intentional infliction of emotional distress, and, of course, alternative claims for rescission and/or breach of contract with respect to the various fee agreements. (CT* 1-37.)

B&V petitioned for an order compelling arbitration, as provided in the January 1996 Agreement, as modified. (CT* 85-121.) The court conducted an evidentiary hearing, receiving testimony from the parties and numerous exhibits. The court held that the Phillips were seeking inconsistent remedies by attempting to block arbitration through the shield of the May 1998 Agreement (which did not have an express arbitration clause) while simultaneously

arguing that the May 1998 Agreement was void. (CT* 527.) The court gave the Phillips a choice: they could either agree to binding arbitration under the January 1996 Agreement, as modified, or they could ratify the May 1998 Agreement and waive all defenses thereto, and thus block arbitration. (*Id.*)

The Phillips responded by seeking to disqualify the trial judge. David Phillips' declaration in support of the motion to disqualify offers a lengthy laundry list of charges against the judge, including: (1) the judge was "resentful and jealous" of the Phillips (CT *542); (2) David was "smarter and better educated" than the judge, who was accordingly "offended, insecure, resentful, jealous and vindictive" (CT* 543); (3) the judge was either "lying in order to benefit Mr. Bowles" or "utterly incompetent" (CT *545); and (4) the judge was conspiring with B&V to defraud David and Stephan. (CT* 538, 548-49.) The Phillips threatened to sue the judge and Contra Costa Superior Court for violations of their civil rights and fraud if the judge was not disqualified. (CT* 549.) After a hearing, the Phillips' motion to disqualify was denied. (CT* 610-11.)

Simultaneously, the Phillips filed a response to the trial court's order that they elect a remedy. The Phillips took neither option offered by the court, purporting to simultaneously rescind the May 1998 Agreement while still opposing arbitration under the previous agreements. (CT* 595-601.) In that filing, the Phillips once again insulted the trial judge, accusing the Court of having "become a willing co-conspirator in Defendants' efforts to defraud Plaintiffs," that the court's decision was "ignoble" and "patently asinine," and that the court should "refrain from any further mischief." (CT* 596, 598, 600-01.)

B. B&V's Counterclaim For Breach of Contract, Fraud and Libel

The B&V defendants filed a cross-complaint against David, Stephan and Carolyn Phillips for, *inter alia*, fraud, breach of contract, declaratory relief, intentional infliction of emotional distress and libel *per se*. (CT* 760-74.) Prior to trial, B&V filed a motion for summary adjudication, seeking a finding that the Phillips, through their conduct, had ratified the May 1998 fee agreement. The trial court granted summary adjudication on that issue. (CT 468.)

C. The Jury Finds for B&V

After a 15-day trial, the jury returned a verdict for B&V. (RT 2209.) The jury unanimously rejected the Phillips' claims that B&V had breached its fiduciary duties to them, as well as their claims that either Mr. Bowles or Mr. Westerfield had committed malpractice in connection with the representation. (RT 2210-11.) With respect to B&V's claims against the Phillips, the jury unanimously found that: (1) David and Stephan had committed unexcused breaches of the May 1998 Agreement, damaging B&V in the amount of $3,699,259.92 (RT 2219-20); (2) David Phillips was guilty of false promise, damaging B&V in the amount of $466,752 (RT 2217-18); and (3) David and Carolyn Phillips had defamed Richard Bowles and B&V, damaging them in the amount of $375,000 each. (RT 2212-16.) After a brief second phase, the jury awarded an additional $5,000 in punitive damages against both David and Carolyn. (RT 2307-08.) Post-trial motions resulted in an award of attorneys' fees and costs against the Phillips. (CT 6965-6971.)

D. The Court of Appeal's Decision

The Phillips appealed the various judgments. After voluminous briefing in which the Phillips pursued literally dozens of claims of error, the Court of Appeal affirmed the judgments in most respects.

The Court of Appeal agreed that the trial court properly required the Phillips to elect their remedy, given the Phillips' insistence on simultaneously relying on the May 1998 Agreement to block arbitration while still asserting that the Agreement was void. (App. to Pet. at IX-XII.) The Court found that the jury's award of breach of contract damages was supported by substantial evidence in the record. (*Id.* at XII-XV.) The Court affirmed the judgment for libel, finding that the Phillips' statements were not privileged, and that the Phillips had not been precluded from trying to prove the truth of their assertions. (*Id.* at XV-XIX.) Finally, the Court affirmed the dismissal of the Phillips' malpractice claim, holding that the Phillips had failed to offer evidence that anything B&V did caused them damage, and that there was no authority for the Phillips' insistence that costs are recoverable under *Brandt v. Superior Court*, 37 Cal.3d 813 (1985). (*Id.* at XX-XXII.) The Court reversed on only two issues, finding that the damages awarded for false promise were duplicative (*id.* at XIX-XX), and that the attorneys' fees award was unjustified because the deeds of trust were not incorporated into the May 1998 Agreement. (*Id.* at XXII-XXIV.)

E. The Phillips' Petition for Rehearing

Just as they had when the trial court ordered them to elect between their remedies, the Phillips responded with a torrent of contemptuous invective directed at the Court.

"This court's decision affirming [the] judgment is corrupt," the Phillips wrote. (Pet. Reh. at 4.) The Phillips continued:

> In order to affirm the judgment, this court has omitted most of the Phillips' issues and arguments on appeal, has repeatedly and brazenly misstated and misrepresented the facts of this case, has advanced several logically absurd and untenable arguments, and has obstinately refused to follow the law. This court's decision is furthermore marred by obvious bias, inattention, carelessness, reflexive recitation of cliché, and seems to have been prepared without ever having bothered to read the Phillips's Reply Brief. This court should be profoundly ashamed of itself.

(*Id.* at 4-5.)

The Phillips challenged eleven different aspects of the Court of Appeal's decision, repeatedly accusing the Court of Appeal of fraud and corruption and claiming that the Court's decision "negates the authority of the state" and "plung[es] the world back into savagery." (*Id.* at 44.) The Court's reasoning, according to the Phillips, was "precisely the type of thinking . . . that ends in Auschwitz, the Soviet Gulag . . . the Cultural Revolution, and . . . the Inquisition." (*Id.* at 44-45.) "Look in the mirror," the Phillips invited the Court. "You will see the banality of evil." (*Id.* at 45.)

The Court of Appeal denied rehearing, as well as the Phillips' request that the Court publish its decision.

F. The Phillips' Petition for Review to the California Supreme Court

The Phillips then petitioned the California Supreme Court for review of the same six issues raised in the petition for writ of certiorari. The California Supreme Court denied review on October 13, 2004.

G. The Phillips Voluntarily Satisfy the Judgment

Because the disputed amounts were deposited with the clerk of the court, the Phillips did not post a supersedeas bond to secure the judgment while it was on appeal. However, following the Supreme Court's denial of review, the Phillips filed a motion with the trial court asking that the money be released and the judgment paid in full. The motion was granted, the judgment was paid, and a notice of satisfaction of the judgment was filed.

REASONS FOR DENYING THE WRIT

I. THE PETITION PRESENTS NO PROPERLY PRESERVED ISSUES OF FEDERAL LAW, AND THE COURT THEREFORE LACKS JURISDICTION TO REVIEW THE JUDGMENT

The Court has jurisdiction to review the judgments of the state courts, *inter alia*, where "any title, right, privilege, or immunity is specially set up or claimed under the Constitution." 28 U.S.C. § 1257.

Petitioners half-heartedly attempt to bring their first three issues presented within the scope of Section 1257 by alleging that their constitutional rights were violated because the state courts incorrectly decided issues of state

law. However, the Court has repeatedly recognized that a mere error in the application of state law is not a denial of due process. *Engle v. Isaac*, 456 U.S. 107, 121 n. 21 (1982). Otherwise, every alleged misapplication of state law would constitute a federal constitutional question subject to Supreme Court review. *Beck v. Washington*, 369 U.S. 541, 555 (1962); *Gryger v. Burke*, 334 U.S. 728, 731 (1948); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930)(dictum); *American Ry. Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927).

Petitioners make no attempt at all to point out any basis in Federal law for their last three issues they present for review. The Court lacks the authority to review state court determinations of purely state law. *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). This is so even when a properly preserved substantial question of federal law is also present in the case. *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589, 597-98 (1934).

Even if any Federal issues were presented, petitioners still would have the burden under the Court's Rule 14.1(g)(i) of demonstrating:

> the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Petitioners fail to demonstrate that any of their purported "Federal" issues were properly preserved for the Court's review. Although they cite to their Petition for Rehearing before the Court of Appeal with respect to certain issues (Pet. at 12, 13, 26, 27), raising a Federal issue in a petition for rehearing is not sufficient. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987).

The petition should be denied on the grounds that it contains no properly preserved issue of Federal law, and the Court is accordingly without jurisdiction.[2]

II. THE COURT OF APPEAL PROPERLY FOUND THAT SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S APPLICATION OF THE ARBITRATION CLAUSE TO ALL DISPUTES BETWEEN THE PARTIES

The January 1996 Agreement, which governed the representation until at least May 1998, contained a clause requiring binding arbitration of "all fee disputes." (Exh. 5,

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[2] There is authority for the proposition that where a state court has rejected a claim of Federal right on state law grounds, the Court may inquire not whether the state law question was correctly decided, but whether "fair support" exists in the record for the state court's action. *E.g., Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux*, 279 U.S. 737, 744-46 (1929); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917); *Creswill v. Grand Lodge Knights of Pythias of Georgia*, 225 U.S. 246, 261-62 (1912). However, the Phillips are not making a claim of Federal right here, which was defeated on state law grounds; rather, the Phillips claim that their Federal rights were violated by the California courts' resolution of the state law issues. Nevertheless, we show below that the various state-law holdings of the California Court of Appeal are amply supported by the law and the record.

p. 3, ¶ 9.) The trial court found that the clause applied to the dispute between the parties, and the Court of Appeal affirmed:

> The trial court also properly found that the January 1996 contract's provision for arbitration of 'fee disputes' applied to the dispute between the parties. On appeal, the Phillipses deny that their dispute was a fee dispute. However, there was substantial evidence that the Phillipses' grievances with B&V, while variously characterized, was a dispute over the compensation due B&V. Significantly, the Phillipses' complaint was founded upon allegations that B&V incurred excessive fees and "extort[ed]" modifications to the parties' retainer and fee agreement.

(App. to Pet. at XI.)

The Phillips claim that this routine conclusion somehow constitutes a holding that parties may be required to arbitrate matters beyond the scope of their agreement. (Pet. at 9.) In fact, neither the trial court nor the Court of Appeal ever said anything of the kind; rather, both courts properly held that the dispute between B&V and the Phillips was fundamentally one over the fees due to B&V, a matter that the Phillips *had* agreed to arbitrate.

That holding was plainly correct. As the Court of Appeal noted, the Phillips' Complaint consists of repeated charges that (1) B&V negligently underestimated the total fees which the Phillips would incur in the litigation; (2) B&V incurred excessive fees; (3) every fee agreement that the parties had ever entered into was void for multiple reasons; and (4) B&V's willingness to revise the fee arrangements between the parties in hopes that the Phillips would meet their commitments to B&V somehow constituted

a breach of fiduciary duty. (CT* 3-4, 6-33.) Melvin Phillips, David and Stephan's father, has admitted that the Phillips' bogus malpractice claims were brought in order to give them negotiating leverage in connection with the fee dispute between the parties. (CT* 095.) Moreover, Richard Bowles testified that he believed that the arbitration clause applied to all disputes between the parties, and that the Phillips never questioned the breadth of the clause. (RT* 33, 83, 241.)

The trial court, sitting as a trier of fact on the petition to compel arbitration, properly resolved this dispute of fact by concluding that B&V's evidence regarding the nature of the dispute and the breadth of the arbitration clause was worthy of belief, and the contrary testimony of David Phillips was not. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 972 (1997).

III. THE COURT OF APPEAL PROPERLY AFFIRMED THE TRIAL COURT'S HOLDING THAT THE PHILLIPS' CONDUCT RATIFIED THE MAY 1998 CONTRACT

After an evidentiary hearing on B&V's petition to compel arbitration, the trial court found that the January 1996 Agreement, which contained a clause requiring binding arbitration of disputes, was fully enforceable. Accordingly, the court held that unless the Phillips agreed to arbitration, their conduct would be deemed a ratification of the May 1998 Agreement, which contained an integration clause but not an arbitration clause. (CT* 531-32.) When the Phillips refused to consent to arbitration (CT* 573-79), the trial court denied B&V's petition and subsequently held that the Phillips had ratified the May

1998 Agreement. (CT 468.) The Court of Appeal affirmed. (App. to Pet. at X-XI.)

As a general rule, a plaintiff may pursue inconsistent remedies up until the time of judgment. However, where the plaintiff's pursuit of one of those remedies works a significant prejudice to the defendant (or results in a significant benefit for the plaintiff), the plaintiff is deemed to have elected between his remedies, and is estopped from pursuing the alternative remedy. *E.g., C.J.A. Corp. v. Trans-Acton Financial Corp.*, 86 Cal.App.4th 664, 669-70 (2001); *Smith v. Golden Eagle Insurance Co.*, 69 Cal.App.4th 1371, 1375-76 (1999).

In their petition, the Phillips claim that they complied with the trial court's order and elected arbitration. (Pet. at 12.) Not so. Although the Phillips' "Election" included contemptuous language suggesting that the Court order arbitration as "a futile waste of time and resources" pursuant to the Court's "patently asinine" decision which would "eventually be overturned," the Phillips made it abundantly clear that they were *not* agreeing to arbitration:

> Plaintiffs do not, however, agree to arbitration and do reserve their right to litigate all claims against Defendants . . . The Court should vacate its decision of December 18, 2000, and take no further action in this matter until Judge Flinn either recuses himself or is removed for cause . . . Plaintiffs do not hereby agree to arbitration and will have that arbitration set aside in due course . . . No arbitration can, therefore, be ordered on the agreed [sic] facts in this case.

(CT* 596, 598.)

The Court of Appeal properly applied settled principles of election of remedies here, holding that the Phillips could either agree to arbitration and continue challenging the May 1998 Agreement, or reject arbitration and be deemed to have ratified the May 1998 Agreement, but not both.

IV. THE COURT OF APPEAL PROPERLY HELD THAT THE PHILLIPS' STATEMENTS WERE UNPRIVILEGED, FALSE AND DEFAMATORY

The jury unanimously held David and Carolyn Phillips liable for libel based upon three types of defamatory statements offered in evidence by B&V: statements made in letters (Exhs. 469, 473, 476, 575); in pleadings (Exh. 484); and statements to news reporting agencies (Exh. 493) that resulted in the republication of defamatory statements in a newspaper article (Exh. 482). In these documents, the Phillips repeatedly accuse Richard Bowles and Bowles & Verna of having committed "extortion" and of being "criminals."[3] (*E.g.*, Exh. 469 ("Bowles & Verna is resolute in continuing its pattern of extortion and wrongdoing"); 473 ("As long as your clients persist in their attempts at fraud, extortion, and criminal conspiracy . . . your clients are again up to their old tricks of trying to collect more than they are actually owed through fraud and extortion"); 476 ("caused by Bowles & Verna due to its

[3] Of course, the Phillips' charges are not protected by the First Amendment. "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

fraud, extortion"); 484 ("to protect against B&V's pattern of extortion . . . This tactic, of course, is entirely consistent with B&V's habitual *modus operandi*: extortion . . . B&V are criminals. B&V are extortionists. B&V are a danger to the public").) The Court of Appeal affirmed the judgment, holding that the Phillips' statements were not privileged, and rejecting the Phillips' claims that they were prevented from proving the truth of their statements at trial. (App. to Pet. at XV-XIX.)

The Phillips claim that their statements were protected by California's litigation privilege, and that they were precluded from proving the truth of their statements at trial. (Pet. at 13-23.) The Phillips' claims are frivolous.

A. The Litigation Privilege Does Not Protect Everything a Party Says During Litigation

Five different judges – two trial judges and the three members of the Court of Appeal panel – have concluded that the Phillips' charges of criminal misconduct against Mr. Bowles and Bowles & Verna were outside the litigation privilege. (CT 564 (Judge Kolin); RT 1639-40, 1644-65 (Judge Bruiniers); App. to Pet. at XV-XIX.) That conclusion was plainly correct based upon settled law.

Under California law, the litigation privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action. *Silberg v. Anderson*, 50 Cal.3d 205, 212 (1990). As the Court of Appeal observed herein, "the relevancy requirement is real." (App. to Pet. at XVI.) The litigation privilege "does not prop the barn door wide open for any

and every sort of prelitigation charge or innuendo, especially concerning individuals." *Nguyen v. Proton Technology Corp.*, 69 Cal.App.4th 140, 150 (1999).

The "relation" prong means a functional connection; in other words, the communication "must function as a necessary or useful step in the litigation process . . . This is a very different thing from saying that the communication's *content* need only be related in some way to the subject matter of the litigation." *Rothman v. Jackson*, 49 Cal.App.4th 1134, 1146 (1996). The test can be satisfied only where a communication functions "intrinsically, and apart from any consideration of the speaker's intent, to advance a litigant's case." *Id.* at 1148.

This was an action to determine the amount due to B&V under the operative fee agreement. B&V sued on the contract(s); the Phillips made a litany of allegations of misconduct in hopes of avoiding the contracts, throwing in a malpractice claim for the sake of negotiating leverage. The case does not and has never had anything to do with the crimes of extortion, conspiracy, or indeed, criminal conduct of any kind. The Phillips have never demonstrated how their defamatory statements were a "necessary and useful step in the litigation process," or how their communications functioned instrinsically to advance their case, and they make no such showing in the Petition either.

B. The Phillips Were Not Prevented From Attempting to Prove the Truth of Their Defamatory Statements

Nor were the Phillips unfairly precluded from proving the truth of their defamatory statements.

After the trial court reaffirmed the earlier ruling that the Phillips' communications were not privileged, David Phillips informed the judge that the Phillips wished to assert a defense of truth. (RT 1659-60.) The trial court then recited the elements of the crime of extortion, quoting from CALJIC Jury Instruction 14.70, and asked David Phillips what evidence he could introduce to prove those elements. (RT 1663-64.) David was unable to make a sufficient showing, merely repeating his claims that B&V had threatened to sabotage the bad faith litigation and making the bizarre claim that B&V had threatened Carolyn Phillips' life. (RT 1664.) The trial court then properly ruled that "none of the offers you have made would establish, if proven, the requisite elements of the criminal elements of extortion. And so the – Ms. Phillips is not being precluded from establishing the truth of the matter because there is no evidence or offer of evidence made which would establish those elements." (RT 1664-65.)

Despite that ruling, the trial court ultimately permitted Carolyn Phillips to testify that what they really meant by "extortion" was that Mr. Bowles and B&V had "tak[en] total advantage" of the Phillips by "getting them into a position of vulnerability where they can do nothing else and taking advantage." (RT 1860; *see* RT 1854-55, 1858-59.) Indeed, the Phillips alluded to their bogus coercion claims again and again before the jury. (RT 609-10, 617-18, 652-53, 677, 901, 1858-60, 1865, 1869-70, 1879, 2007-08). In flagrant disregard of the court's evidentiary rulings, David and Carolyn Phillips managed on at least two occasions to draw the jury's attention to their coercion claims and suggest that the trial court was hiding the truth from the jury. (RT 1865 "(Carolyn) I meant what I

said. I would love to prove it – but I'm not allowed"); 1879 ("Q. (David) And I can't ask you what that abuse is about – . A. (Carolyn) No, we're not allowed to talk about that.")

The Phillips were not barred from proving the truth of their allegations. The trial court read David the legal elements of extortion, asked him what evidence he could offer to satisfy those elements, and David was unable to make a sufficient offer of proof. The court's ruling, affirmed by the Court of Appeal, was proper and based upon settled California state law.

V. THE PHILLIPS DEMONSTRATE NO BASIS FOR REVIEW WITH RESPECT TO FALSE PROMISE

Next, the Phillips argue that review should be granted with respect to yet another issue of California state law – the validity of the judgment holding David Phillips liable for false promise, since a judgment for false promise cannot be based upon what the Phillips insist was an "extorted" agreement. (Pet. at 24-26.)

The Phillips' argument is frivolous. The Court of Appeal reversed the judgment as to false promise on the grounds that the damages awarded were duplicative. (App. to Pet. at XIX-XX.) Although B&V respectfully believes that the Court of Appeal's decision was incorrect in this respect, the court's action means that there no longer *is* any judgment for false promise, and therefore, there is literally nothing for the Court to review as to this issue.

Even if the false promise judgment had stood, the Phillips' insistence that the May 1998 Agreement was extorted is preposterous. In late 1998, David Phillips described the May 1998 Agreement as follows:

> [T]here is a binding contract. You're bound by it . . . You can't – you can't renegotiate. You're stuck with it. You signed a deal. You're stuck with it. You have to honor it.

(RT 1911.)

Substantial evidence in the record demonstrated that the May 1998 Agreement was not signed under duress. (*Supra* at 7-8.)

VI. BECAUSE SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S FINDING THAT DAVID AND STEPHAN PHILLIPS BREACHED THE MAY 1998 AGREEMENT, THE COURT OF APPEAL PROPERLY AFFIRMED THE AWARD OF FULL CONTRACT DAMAGES TO B&V

Next the Phillips claim that the trial court's award of breach of contract damages to B&V pursuant to the May 1998 Agreement, which was affirmed by the Court of Appeal, conflicts with the California Supreme Court's decision in *Fracasse v. Brent,* 6 Cal.3d 784, 792 (1972). (Pet. at 26-27.)

The Phillips are wrong for at least two reasons: first, *Fracasse* has nothing to do with the proper measure of damages for an attorney when the client has breached the fee agreement; and second, even if calculating damages pursuant to the contract rather than *quantum meruit* was

error – which it was not – the Phillips invited the error and cannot now complain of it.

In *Fracasse*, an attorney was discharged without cause by a client who he was representing based upon a contingent fee contract. There was no breach of contract by the client involved. *Fracasse v. Brent*, 6 Cal.3d at 790 (discharge of attorney is not breach of contract).

The evidence herein, in stark contrast to *Fracasse*, showed that a few days after B&V obtained a seven and one-half million dollar verdict for the Phillips, David repudiated all the fee agreements, telling the attorneys that the Phillips had no obligation to pay B&V anything, and that in his view, all of the fee agreements between the Phillips and B&V were void. (RT 1290-91, 1597, 1621, 1691, 1910.)

The principles applicable to these circumstances are well-settled under California law. When one party repudiates a contract, the other party's further performance is excused, and he may treat the conduct as a total breach. *County of Solano v. Vallejo Redevelopment Agency*, 75 Cal.App.4th 1262, 1275-76 (1999); *Taylor v. Johnston*, 15 Cal.3d 130, 137-38 (1975); Civil Code § 1440. The Phillips' repudiation of the contract entitled B&V to recover damages pursuant to the contract, *not* under *quantum meruit*. *See Franklin v. Appel*, 8 Cal.App.4th 875, 892-93 (1992) (where contingency fee agreement was not voidable, attorney's damages should have been calculated under the contract).

Even if the trial court's failure to calculate damages based upon *quantum meruit* had been error – which it certainly was not – the Phillips would still be unable to rely upon it as a basis for their petition. B&V had a cause

of action for *quantum meruit* recovery in their cross-complaint. The Phillips moved *in limine* to exclude all evidence of *quantum meruit* on the grounds that B&V was proceeding under the May 1998 Agreement, and the trial court granted the motion. (RT 252.) Therefore, any argument that B&V's recovery should have been measured by *quantum meruit* is barred by the doctrine of invited error.

VII. THE COURT OF APPEAL PROPERLY AFFIRMED THE SUMMARY ADJUDICATION OF THE PHILLIPS' CLAIM FOR MALPRACTICE

Finally, the Phillips claim that the trial court's granting of summary adjudication with respect to their malpractice claim, which was affirmed by the Court of Appeal, conflicts with several Court of Appeal decisions which have permitted the recovery of expenses in bad faith actions which do not qualify as "costs" under C.C.P. § 1032. (Pet. Rev. at 27-29.)

The Court of Appeal held that "There is no authority for the Phillipses' claim that *Brandt* permits recovery of all expenses incurred in prosecuting an action to recover policy benefits, even if the expenses fall outside the statutory definition of 'costs' under Code of Civil Procedure section 1032." (App. to Pet. at XXII.)

The cases cited by the Phillips are not to the contrary. *Orrick Herrington & Sutcliffe v. Superior Court*, 107 Cal.App.4th 1052, 1059 (2003) has nothing to do with expenses recoverable in insurance bad faith cases. The holding in *Orrick* was that the plaintiff had failed to show actual damages arising from the allegedly negligent drafting of a marital settlement agreement. The courts in *Jonathan Neil & Assoc., Inc. v. Jones*, 33 Cal.4th 917, 929

(2004), *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 109 Cal.App.4th 1020, 1045 (2003) and *Marie Y. v. General Star Indemnity Co.*, 110 Cal.App.4th 928, 948 (2003), merely remark in passing that the plaintiffs in each case had recovered costs below without explaining what was recovered and the basis for the recovery. The Phillips fail to offer any reported decision allowing recovery of all expenses under *Brandt*. Thus, the Court of Appeal properly affirmed summary adjudication of the Phillips' malpractice claim.

CONCLUSION

The petition presents no properly preserved issue of Federal law. The purely state law issues raised by petitioners were properly resolved by the California courts based upon substantial evidence in the record and settled principles of law. The petition should be denied.

Respectfully submitted,

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